85801-2

No. 280543

COURT OF APPEALS

DIVISION III OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

vs.

TYLER WILLIAM GASSMAN, Defendant,

DAVID R. PARTOVI, Respondent and Real Party in Interest.

APPELLANT'S REPLY BRIEF

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I. REPLY REGARDING RESPONDENT'S STATEMENT OF THE CASE CONTAINED IN HIS BRIEF

Respondent's Statement of the Case, pages 5-7, lists as facts his own statements contained in his Declaration of Counsel in support of his own motion to dismiss for prosecutorial misconduct, a declaration beginning with his assertion that "*Most* or all of the allegations contained herein *can be verified from personal knowledge by one or more of the attorneys* which will appear before this Court Monday January 12, 2009, at 11:00 a.m." CP 135, No. 1. (Emphasis added).

Without commenting on the requirement that personal knowledge support a declaration, never mind a declaration that other people may have a basis to present facts in the future, the trial court neither made a finding supporting these factual allegations nor considered these "facts" in the hearings dealing with the assessment of sanctions in this case. Actually, the trial court specifically stated it was not considering these allegations because they related to other cases involving these same defendants:

> THE COURT: And let me just say I have a little footnote here when we had this whole meeting a while back on this issue, I indicated that I'm not here to deal with the other cases, with objections. And I understand for historical purposes, you can give me that information. I want to be really, really, clear that I'm not here to critique, comment on anything that happened in any of those other cases. Okay. My issue here is sanctions in this case.

RP 189; lines 12-20.

Later, the lower court reemphasized that it was not considering or addressing allegations dealing with the other criminal cases involving the same defendants:

> THE COURT: Now, I want to be really, really, clear with everybody, and I think I have been consistently, I'm not addressing -- I have nothing to do with the other cases. So any bad behavior on anybody's part up to this case I'm not addressing that. That was for the judges in the other cases. I'm not. I only care about what happened in this case.
>
> . . . .
>
> THE COURT: I want to be clear with everybody, because people have the tendency to drag that into this and it's not going to be part of it.

RP 205, lines 1-7; lines 14-16

Additionally, the trial court denied defendant's motion to dismiss, finding these allegations to be "amorphous" and holding there was no "animus or evil intent or purposeful misconduct on the part of the State." CP 124-25. (Court also holding that the defendants were not prejudiced by the amendment of the information).

The Respondent herein, defendant below, never requested more specific factual findings in the lower court and can not now complain of their absence.[1] His rendition of the facts is without support in the record,

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[1] *See State v. Reid*, 98 Wn. App. 152, 157, 988 P.2d 1038 (1999).

> The State does not argue and we find nothing in the record indicating that it requested the more detailed findings. Thus, it

especially where, as here, the trial court held against him and never found any of these "facts" to exist.

II. ARGUMENT IN REPLY

a) Respondent's request for remand

Respondent argues for remand, suggesting that the lower court failed to make a finding regarding bad faith. Brief of Respondent, pages 8-12. Respondent misunderstands the difference between a court finding bad faith without explicitly saying so, such that the conduct complained about is "tantamount to a finding of bad faith,"[2] and the present situation, where the court specifically and repeatedly held there was no bad faith

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> cannot object on appeal to their omission. *See, e.g., United States v. Gregg*, 179 F.3d 1312, 1317 (11th Cir.1999); *Favell v. Favell*, 957 P.2d 556, 562 (Okla.Civ.App.1997) (party failing to request detailed findings below cannot complain of lack of such findings on appeal). Further, an appellate court does not independently evaluate the testimony to embellish the findings. *See State v. Carner*, 28 Wn. App. 439, 441, 624 P.2d 204 (1981). Thus, we need not further consider the challenge to findings 2 and 3.

See *In re Marriage of Olivares*, 69 Wn. App. 324, 334, 848 P.2d 1281 ("the absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue"), *review denied*, 122 Wn.2d 1009, 863 P.2d 72 (1993). The absence of a finding regarding a material fact is usually regarded as a finding against the party having the affirmative burden of proving that fact. *Seattle Flight Serv., Inc. v. Auburn*, 24 Wn. App. 749, 751, 604 P.2d 975 (1979).

[2] *See State v. S.H.*, 102 Wn. App. 468, 479, 8 P.3d 1058 (2000).

involved in its award of sanctions. See RP 15, lines 12-20; (court stating that after Mr. Cruz's explanation it did not appear that there was any malicious intent on Mr. Cruz's part to sandbag the defendants); RP 41-42 (state was careless not purposeful); RP 89 (court reiterated that it had never believed the amendment had be done purposefully, or to "hide the ball."); RP 236, lines 6-20 (court never thought it was purposeful, "I thought at the time is that everybody has too much to do and it just got away from them."); CP 124-129 (denying Defendant Gassman's CrR 8.3 motion to dismiss, holding there was no animus, evil intent or purposeful misconduct on the part of the State); CP 24-25 (order continuing case and imposing sanctions, finding carelessness); CP 118 (order denying reconsideration, state did not act on purpose in late amendment, but was careless).

Because there is a finding of no bad faith, and in fact many findings stating there was no bad faith, the record is clear. Therefore, Respondent's request for remand is without merit.

b) Silence as authorization for the imposition of sanctions

Without citation to authority, Respondent suggests that because CrR 2.1 is silent as to the imposition of sanctions, that this very silence expands the scope of the rule, authorizing the imposition of sanctions.

Brief of Respondent, pages 12-13. Respondent's suggestion cannot bear the weight of authority to the contrary.

Appellate courts use the same approach to interpret court rules as they do to interpret statutes. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). If the language of the rule is clear on its face, appellate courts give effect to its plain meaning and assume the rule means exactly what is intended. *State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). CrR 2.1(d)[3] permits amendments up to the time of verdict, and is a permissive rule using the word "may" – therefore, the judge can deny the motion. That is the plain meaning of this rule – the sanction for its breach is the denial of the motion to amend.

Other court rules provide for sanctions. CR 11 (a) contains specific authorization for sanctions that "include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee." Because CrR 2.1 does not provide for monetary sanctions, the omission of monetary sanctions must have

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[3] CrR 2.1(d) provides:

> (d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

been purposeful.[4] Respondent's argument for the expansion of the breadth of available sanctions from the rules silence is without legal support.

III. CONCLUSION

For the reasons stated herein, and in the opening brief, the Appellant respectfully requests that this Court reverse the lower court's award of sanctions to Respondent Mr. Partovi.

Respectfully submitted this 12th day of March, 2010.

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[4] Compare *State v. Hubbard*, 106 Wn. App 149, 22 P.3d 296 (2001), where this Court held:

> We use the same approach to interpret court rules as we do to interpret statutes. *State v. Hutchinson*, 111 Wash.2d 872, 877, 766 P.2d 447 (1989) (rules of statutory construction apply to court rules). And so "[t]he omission of a similar provision from a similar statute usually indicates a different legislative intent." *Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Comm'rs*, 92 Wn.2d 844, 851, 601 P.2d 943 (1979) (citing 2A c. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 290-91 (4th ed.1973)); *State ex rel. Bell v. Superior Court*, 196 Wash. 428, 432-33, 83 P.2d 246 (1938).
>
> The omission then from the superior court rules of any provision deeming a waiver of arraignment to be a not guilty plea must have been purposeful.

State v. Hubbard, 106 Wn. App at 153-54.